*Supreme Court of Connecticut.*

ELLA E. BEARDSLEY *v.* THE CITY OF HARTFORD.

A city is not bound to maintain a railing in front of the numerous basements and basement steps that line its business streets.

As cities are, by reason of special advantages, burdened with special duties as to highways from which country towns are exempt, so they have also the benefit of exemptions from liability arising out of the necessities of their business.

Open basement descents being necessary to the business of a city, the failure of the city to erect a barrier in front of such a basement is not of itself negligence, and the city is not liable to a passer by who, without negligence on his part, falls into such basement.

THIS was an action on the statute with regard to highways, to recover damages from the defendant city for an injury sustained by the plaintiff through, as it was claimed, the defective condition of a sidewalk of the city. The case was defaulted in the Superior Court and heard in damages. The court awarded full damages, and the case is brought up by a motion in error, the defendant claiming that the court erred in awarding more than nominal damages.

*S. O. Prentice*, for appellants.

*A. P. Hyde* and *F. E. Hyde*, for appellee.

The opinion of the court was delivered by

LOOMIS, J.—The facts as presented by the record are briefly as follows: The place where the injury was received is a long established street of the city known as Farmington Avenue, at a point where a hotel fronts upon the street, with the space between it and the street line open and flagged like the sidewalk, with nothing to indicate the line between the street proper and the open space in front of the hotel. The front of the building is found to be seventeen and a-half feet south from the curbstone of the sidewalk. The line of the street is eleven feet south of the curbstone, leaving six and a-half feet of space, which was private property, between the street line and the front of the building. The hotel is kept in the second and higher stories of the building, with an entrance in front; and all the lower story is occupied by stores fronting on the street, the whole frontage of the building being seventy-five feet. One of these stores, with a basement, and a stairway in front leading

to the basement, was occupied by one Harbenstein, as a bakery. The basement stairway extended four feet and seven inches from the front of the building, and had no protection except an iron railing on the west side of it. The plaintiff, on the 12th of February 1877, had occasion to pass along the sidewalk from the east about half-past nine in the evening, with two other ladies, and fell into this basement entry-way and was seriously hurt. It is found that the night was very dark and the wind blowing with great force, and that the three ladies went in close to the building to protect themselves somewhat from the violence of the wind, and that the plaintiff, when near the basement entrance, without being aware of its vicinity or existence, turned to speak to one of the ladies behind her and stepping backward fell into the opening. It is also found that the accident happened without negligence or want of care on her part.

It is well settled that a town or city is not liable for injuries from a defect in the highway, except as made so by statute. In some of the states a distinction is made, as to the rule of liability, between municipal corporations, or corporations proper, and quasi corporations, such as towns or counties, imposing a greater liability on the former. But this distinction is not made by the courts of the New England states, and it is holden by them that a municipal corporation is liable only by force of the statute. That is clearly the law of this state.

Our statute provides that, "towns shall, within their respective limits, build and repair all necessary highways and bridges, except where such duty belongs to some particular person." Gen. St., p. 231, sec. 1. Cities by their charters are charged with the same duty with regard to the highways and bridges within their limits. And the 10th section of the statute provides that, "any person, injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair." Another section of the statute provides that there shall be "a sufficient railing or fence on the side of such bridge, and of such parts of such road as are so made or raised above the adjoining ground as to be unsafe for travel." We think, however, that this provision does not apply to a case like this

It has been repeatedly held in this and other states that the absence of a railing, where the public travel is endangered by the want of it, constitutes a defect in the highway; making the

town or city liable, not by force of any statute specifically requiring a railing, but under the general provision that the highway shall be kept in repair—that term being held to mean that they shall be kept in such condition as to be *safe for public travel.*

A sidewalk is, of course, a part of a street, and entitled to the same protection as the rest.

The counsel for the defendant city has argued the case as if the mere fact that the place where the injury occurred was outside of the limits of the highway, is sufficient to save the city from all liability, even though the opening made travel unsafe. This proposition cannot be sustained. An object or a state of things outside of the line of the street may render travel unsafe, and make a town or city liable for an injury occasioned by it. Of course nearness to, or remoteness from, the line of the street is a very important and generally decisive consideration in determining whether the travel is rendered unsafe by it; but where it is so near as clearly to endanger public travel, the fact that it is outside of the line of the street has no other effect than this: If within the line of the street the authorities of the town or city have entire control over it, and can remove it if it be an obstruction, or fill up the cavity, if the defect be of that character, while they have no power to go upon private property for the purpose of doing it. The whole power, and so the whole duty of the corporation, is to protect the public against it by a railing. This they have power to place, not on the property of the adjoining owner, but only on or within the line of the street. If the adjoining owner has dug a deep hole near the street line he is personally liable for any injury that a passenger upon the sidewalk, who uses ordinary care, may sustain by falling into it. But the city will also be liable, not for the digging of the hole, nor for leaving it unfilled, but for not doing what it had perfect power to do, erecting a barricade of some sort to prevent passengers from getting into it.

About this general principle there can be no serious question. It is well stated by HOAR, J., in *Algeo* v. *City of Lowell*, 3 Allen 405: "The place where the plaintiff fell was indeed outside of the line of the street; but the defect in the street which occasioned the injury was the want of a railing, if one was necessary at that place to make the street safe and convenient for travellers in the

use of ordinary care. * * * The true test is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger; but whether there is such a risk of a traveller, using ordinary care in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient." Numerous authorities might be cited to the same effect.

The whole question in the present case is, therefore, whether it was the duty of the city to have placed a railing or barrier of some kind against these basement steps, so as to make sure that no passenger on the sidewalk could stray from the public way and fall down them.

And here it is to be observed that the city had no power to erect a railing that should simply fence in, in front and on the sides, this basement stairway. It would have had to go upon private ground to do this, and that it had no right to do. It could only erect a railing along the outer line of the sidewalk in front of the stairway. But such a railing would not have protected passengers from getting behind it unless it was carried along the whole front. It is found that a fence ran along the street line from the east, but only so far as the east corner of the hotel. As the plaintiff came along the walk from the east she must have been within the street line until she reached the corner of the building. Harbenstein's store was the second from the east corner, and the basement steps were immediately east of the door of his store. The plaintiff must have made, therefore, a very sudden deflection from the line of the sidewalk to bring herself in that short space, probably not over twenty or at most twenty-five feet, in close proximity to the building. It is found that the drug store at the east corner of the building had lights in the windows, so that she must have been aware of the deflection of her course. And her conduct in the matter is explained by the finding that she turned in towards the building "to avoid somewhat the violence of the wind." It is plain that, turning in at such an angle, as she left the part of the sidewalk that was fenced, would have brought her inside of any mere front railing that the city could have erected along the line of the walk on its own ground.

A passenger thus turning in could be protected from falling into the basement gangway only by side railings, which the city had no

right to place there, or by a continuous front railing that would have cut off all access to the hotel door and the doors of the stores, except through gates to be opened and shut as people passed in and out. Such an embarrassment as this to free ingress and egress would not be tolerated in a city, in front of a hotel and stores.

And this brings us to what we think is the real question in the case. Is a city bound to maintain a railing in front of the numerous basements and basement steps that line its business streets? Such basements are used in every populous city for business purposes of almost every kind. In a large city like New York the first story of almost every business block is reached by steps, that extend to the line of the street, while on each side of them are steps leading down to offices in the basement. These offices are of great value and rent for large sums, and it is essential to their convenient and profitable use that they be as open as possible to the entry of the public. Indeed, a railing in front of them, with the necessity of opening and shutting a gate as people passed in and out, would greatly impair their value for all the purposes that give them value. The same state of things exists, though in less degree, in a smaller city like Hartford. Along its principal streets, such basement shops may be counted by scores. In many of them there is not merely the necessary depression for steps, but the excavation extends along the whole front, giving room for larger windows and wider entrance. Every such depression by the side of the walk, though outside of the limits of the street, renders travel along the sidewalk dangerous; for even if the descent be one of but two or three steps, it would be enough to cause a dangerous fall to one who should inadvertently step off. Indeed, as a person by such a fall would be thrown against the brick or granite sides of the building, such a place would be much more dangerous than a pit-fall as deep in a place in the country, where one would fall only upon the soil. It is true that the more populous the city and hence the more thronged the street, the greater is the number of persons exposed to the danger; but as the city becomes more populous and the streets more thronged, the higher become rents, and the greater necessity for and value of such basement offices and places of business. It may indeed be set down as one of the necessities of city life, that basements along its business and therefore its most thronged streets, should be thus used, and that they should be not only open but inviting to the public. Now what is the duty of

the city with regard to them? There is no practicable way of perfectly protecting the public but by a railing in front of them. Can it be regarded as the duty of a city to maintain such a railing? Are we to apply to the case, without qualification, the same rule that would be applied to a pit-hole, like the cellar of a burned building, adjoining a sidewalk, where a railing would cause no inconvenience to the owner of the property?

It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, "*cessante ratione, cessat ipsa lex.*" This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances.

There are certain special duties with regard to highways resting on cities by reason of their character as such. One is that of having a more perfect road-bed for the greater amount of travel. Another, that of making sidewalks of ample width and generally flagged. Still another, that of removing snow and ice from the streets and walks. Thus, in *Landolt* v. *City of Norwich*, 37 Conn. 618, SEYMOUR, J., says: "The peril (from snow and ice) is not such as to warrant the great expense, in a sparsely inhabited village, of attempting a preventive or remedy; but in cities the aggregate of peril by reason of the number exposed to it becomes considerable, and the means of meeting the needful expense are ample; and hence, in cities the public as such properly undertake the duty of doing the best they can to provide against the dangers to travel which winter in this climate necessarily brings with it." Now if, by reason of the special advantages and special necessities of cities, they are by law burdened with special duties of this sort, from which country towns and villages, by reason solely of their character as such, are exempt, surely the rule should work favorably for cities in those particulars in which the necessities of business impose upon them limitations which do not exist in country towns. People collect in cities in large part for purposes of traffic, and to these purposes the central and most crowded streets of a city are almost wholly devoted. Must not the necessities of this business furnish the law that shall determine the action of the city in

the matter of barring out the public, for the sake of the safety of travellers, from those places below the level of the sidewalk that the business of the city absolutely requires should be kept easily accessible? There are special dangers all along a city street, for an unwary foot passenger, that do not exist in country towns. The projecting steps against which a pedestrian can so easily stumble in the night and be hurt, the hitching posts, posts for awnings, the very curbstone over which he could so easily trip, with the lower level of the gutter into which he could so easily be carried by a misstep, the occasional necessary descent of a steep place by steps, the projecting buttresses of buildings against which he might run —all needing but a slight deflection from the central part of the walk, which one would be very likely to make in a dark and stormy night—all these things, presenting dangers rarely found in a country village, and dangers to which the larger population makes the aggregate of exposure much greater, a city does not attempt, and is not expected, to provide against. They are necessary features of a city, and the peril a necessary incident of city life. The open basement descents are as necessary to the business of the city as the open and unprotected wharves of a seaport are to its commerce. Some streets in the city of New York lie close along the water, the wharves opening from them, and necessarily kept open for the passage of drays, while their outer edge is protected only by a low string-piece, which, while sufficient to prevent drays from backing into the water, would be no protection to a foot passenger, but would be likely to cause him to stumble and fall into the water. These unprotected wharves are often but a few feet from the line of the street, and the passenger could easily stray upon them in a dark night.

The principle we are laying down is only the old established one, that the city must have been guilty of negligence in leaving a basement entrance unprotected, before it can be liable for an injury happening by reason of it. If the erection of a barrier in front of such an entrance is what the city has no right to do, or if, having the right, it is what it cannot reasonably be expected to do, then there is no negligence in the omission to do it. This principle is abundantly sustained by the authorities.

In *Taylor* v. *Peckham*, 8 R. I. 349, the court held that a town was not liable for an injury from the fall of a sign which had not been securely fastened in its place upon a building outside of the

limit of the highway. BRADLEY, C. J., in giving the opinion of the court, says (p. 352), "The liability for such accidents would carry with it an equally extensive authority. The towns must necessarily have a corresponding right to control the uses of property adjoining the highway, so as to protect themselves from the liabilities for such use." In *Hubbard* v. *City of Concord*, 35 N. H. 52, SAWYER, J., giving the opinion of the court, says (p. 68), "We think it must be held to be the meaning of the enactment which subjects towns to liability for injuries resulting from obstructions, insufficiencies or want of repairs in their highways, that nothing is an obstruction which the town was not bound to have removed at the time of the injury under the circumstances of that particular case; nothing an insufficiency which it was not reasonably bound then to have improved; nothing a want of repairs which, in the same view it was not bound to have amended. * * * If there was no duty there was no negligence. In the very idea of negligence is embraced a duty which the party ought to have performed. If the town, under all the circumstances, was not bound to remedy the defect or remove the obstruction, it is chargeable with no negligence or failure of duty." In *Jones* v. *Inhabitants of Waltham*, 4 Cush. 299, the defendant town was sued for an injury by falling into a cattle guard at a place where a railroad crossed the highway. The town had placed a railing before it as far as it was able to do without interfering with the passage of the cars. METCALF, J., giving the opinion of the court, says (p. 301): "The only ground upon which the town can be held liable to this action is, that there was a dangerous place on the roadside which required a fence or barrier to make the road safe for travellers. But when a town has no power to erect such fence or barrier, it is not answerable for the consequences which follow from the want of it." Clearly there can be no difference in law between the case where a city has no power to place a barrier, and the case where it would, in view of all the circumstances, be unreasonable and improper for it to place one.

That the negligence of the town must be actual and not merely constructive, follows from the rule, which is well settled, that the neglect to repair or render safe a highway must be such as would have made the town liable to an indictment. Thus, it is said in *Davis* v. *City of Bangor*, 42 Me. 522, that "the liability of a town for damages arising from a defective highway depends upon proof of the same facts that would render it liable to indictment, and in

all cases where it may be held for damages it may be indicted." In Wood on Nuisances, sect. 324, it is said that "as a rule, those defects only are actionable which are indictable at common law as nuisances;" and further on in the same section the law on the subject of exposures to injury from objects outside of the line of the highway is thus laid down (more strongly we think than the authorities will warrant): "For injuries resulting from any obstruction in the highway itself, and over which the proper authorities have lawful control, and which they can lawfully remove, the town or city is liable. But where the injury results from something outside the limits of the highway, upon land which they have no authority to enter upon, the individual making or continuing the erection or obstruction alone is liable. It would be highly inequitable to hold the town liable for injuries resulting from something over which they have no control and which they cannot remove, any more than any other citizen."

Now, in the court below, the judge, before whom the case was tried upon a hearing in damages, found the fact that travel along the sidewalk in question was endangered by the basement opening in question, and that the plaintiff sustained the injury while in the use of ordinary care, and upon these facts alone held the city liable to pay full damages. We think the court was in error in this, and that a further fact was necessary to the liability of the defendants, namely, that the basement opening was one which the city was bound to have protected the public against by a railing. The law will not infer the liability from the mere fact of the danger. The law will not hold the city to the duty of erecting a barrier before such a place unless in all the circumstances it was reasonable and proper to erect one. And this fact should appear in the finding. There was error in the judgment complained of.

In this opinion the other judges concurred.